

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

UNITED STATES OF AMERICA, ) No. 3:16-cr-05110-RJB  
)  
Plaintiff, ) **ORDER DENYING SECOND MOTION**  
) **TO COMPEL DISCOVERY**  
v. )  
)  
DAVID TIPPENS, )  
)  
Defendant. )

UNITED STATES OF AMERICA, ) No. 3:15-cr-00387-RJB  
)  
Plaintiff, ) **ORDER DENYING SECOND MOTION**  
) **TO COMPEL DISCOVERY**  
v. )  
)  
GERALD LESAN, )  
)  
Defendant. )

UNITED STATES OF AMERICA, ) No. 3:15-cr-00274-RJB  
)  
Plaintiff, ) **ORDER DENYING SECOND MOTION**  
) **TO COMPEL DISCOVERY**  
v. )  
)  
BRUCE LORENTE, )  
)  
Defendant. )

1 This matter comes before the court on the defendants' Second Motion to Compel  
2 Discovery. The court is familiar with the records and files herein and the documents filed in  
3 support of and in opposition to the motion. Oral argument is not required to resolve this  
4 motion.

5 Defendants request that the Court compel the Government to provide the following  
6 discovery:

7 (1) Disclosure as to whether the vulnerability patched by Mozilla Firefox on or  
8 about November 29, 2016, is related to the NIT code;

9 (2) Disclosure, if applicable, of the date that the Government or its agent learned that  
10 the NIT code was available to parties other than the FBI; and

11 (3) A substitute summary "of evidence presented to the court *ex parte*.  
12 Dkt. 108 at 4.

13 Defendants' request is based on technology security blogs, which describe a "patch"  
14 update of the Mozilla Firefox browser on November 29, 2016, issued to protect against a  
15 particular vulnerability. Defendants speculate that this patch may have eliminated the  
16 vulnerability exploited by the NIT code, thus eliminating the Government's interest in not  
17 disclosing the code. Dkt. 108.

18 Even if Defendants are correct—that the vulnerability exploited by the NIT code has  
19 been patched—the Court remains unconvinced that this fact would be a sufficient basis to  
20 require the Government to disclose the NIT code, because the NIT code's classified status  
21 would remain. The requested disclosures implicate classified information. The disclosures  
22 should not be compelled.

23 Furthermore, whether or not the Court might disagree with the NIT code's  
24 classification, it lacks the authority to re-classify a designation made by the Executive Branch.

25 The motion, which is in the nature of a motion for reconsideration, should be denied  
26 because the alleged new facts, which could not have been brought to the court's attention

1 earlier with reasonable diligence, are not facts that would justify a change in the court's  
2 previous orders.

3 Therefore it is now

4 ORDERED that defendants' Second Motion to Compel Discovery (U.S. v Tippens,  
5 3:16-cr-05110-RJB (Dkt. 108); U.S. v. Lesan, 3:15-cr-00387-RJB (Dkt. 153); & U.S. v  
6 Lorente, 3:15-cr-00274-RJB (Dkt. 170)) is DENIED.

7 DONE this 21<sup>st</sup> day of November, 2016.

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10 ROBERT J. BRYAN  
11 United States District Judge  
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